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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

YOUNGSTOWN SHEET AND TUBE COMPANY D/B/A FIBERCAST COMPANY, A DIVISION OF YOUNGSTOWN SHEET AND TUBE COMPANY and T. E. BYERLY COMPANY,
Petitioners

v.

PIERCE ASSOCIATES, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners' pretrial submission to the district court of a proposed form of jury instructions on the issue of whether the pipe and fittings failed to meet the specifications of the contract, which thereafter during trial was not raised by the evidence, constituted a waiver by petitioners of their objection to the submission of similarly worded instructions to the jury.

2. Whether petitioners properly preserved for appellate review the question of whether there was sufficient evidence to justify the submission to the jury of the issue of whether the pipe and fittings failed to meet the specifications of the contract between the parties.

3. Whether any and all express and implied warranties as to both the pipe and fittings and the fabrication instructions accompanying the pipe and fittings were expressly excluded by the contract between the parties.

4. Whether it was error for the district court to instruct the jury that it could return a verdict in respondent's favor if it found that the petitioners breached an implied warranty that the pipe and fittings were fit for the particular purpose for which they were intended.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

All parties who were before the court of appeals are listed in the caption of the case in this Court.*

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*As required by Rule 28.1 of the Supreme Court Rules, the following are parent companies, subsidiaries or affiliates of petitioner Youngstown Sheet and Tube Company.

Fibercast Company, a Division of Youngstown Sheet and Tube Company
The LTV Corporation
Jones & Laughlin Steel Corporation
Jones & Laughlin Industries, Inc.
The Buckeye Coal Company
Chicago Short Line Railway Company
The Continental Supply Company Limited
Continental-Emsco Company Limited
Continental-Emsco International, Inc.
Emerald Mines Corporation
General Alloy Casting Company
Mahoning Insurance Company
Nemacolin Mines Corporation
Second Emerald Mines Corporation
Van Huffel Eastern Corporation
The Youngstown Mines Corporation
The Youngstown Steel Products Company
The Youngstown Steel Products Company of Michigan
Olga Coal Company
Erie Mining Company
Iron Ore Company of Canada
Wabush Iron Co. Ltd.
Mathies Coal Company

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v.

PIERCE ASSOCIATES, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Youngstown Sheet and Tube Company d/b/a Fibercast Company, a Division of Youngstown Sheet and Tube Company, and T. E. Byerly Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 1, 1980.

OPINION BELOW

The opinion of the court of appeals, not reported, appears in the appendix hereto. No opinion was rendered by the United States District Court for the District of Columbia.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 1, 1980. A timely Petition for Rehearing was denied on December 30, 1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

D. C. Code § 28:2-314. Implied warranty: merchantability; usage of trade

(1) Unless excluded or modified (section 28:2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (section 28:2-316), other implied warranties may arise from course of dealing or usage of trade. (Dec. 30, 1963, 77 Stat. 648, Pub. L. 88-243, § 1, eff. Jan. 1, 1965.)

* * *

D. C. Code § 28:2-315. Implied warranty: fitness for particular purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. (Dec. 30, 1963, 77 Stat. 648, Pub. L. 88-243, § 1, eff. Jan. 1, 1965.)

* * *

D. C. Code § 28:2-316. Exclusion or modification of warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but

subject to the provisions of this article on parol or extrinsic evidence (section 28:2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification or remedy (sections 28:2-718 and 28:2-719). (Dec. 30, 1963, 77 Stat. 648, Pub. L. 88-243, § 1 eff. Jan. 1, 1965.)

STATEMENT OF THE CASE

I.

This case resulted from a dispute between respondent, Pierce Associates, Inc. (hereinafter sometimes referred to as "Pierce"), petitioner, Youngstown Sheet and Tube Company, doing business as Fibercast Company, a Division of Youngstown Sheet and Tube Company (hereinafter sometimes referred to as "Youngstown"), and petitioner, T. E. Byerly Company (hereinafter sometimes referred to as "Byerly"). Jurisdiction in the United States District Court for the District of Columbia was based on diversity of citizenship, 28 U.S.C. § 1332, the amount in controversy exceeding $10,000.

Youngstown, through its stocking distributor, Byerly, sold to Pierce certain fiberglass reinforced pipe and fittings for Pierce's use in the construction of the instrumentation portion of the Blue Plains sewage treatment plant located in Washington, D.C. At all times pertinent hereto, Pierce was the mechanical contractor with respect to the instrumentation project, and Youngstown was the manufacturer of the fiberglass pipe and fittings in question.

Under the specifications set forth by the District of Columbia for the instrumentation portion of the Blue Plains sewage treatment plant, certain pressure tests were required to be passed by the system, of which the Youngstown pipe and fittings were an integral part. These pressure tests were performed shortly after personnel of Pierce completed the fabrication and installation of the pipe and fittings. During the course of the pressure tests, leaks in several of the joints of the pipe and fittings were detected. After several unsuccessful attempts were made to repair

the individual leaks, Youngstown and Pierce entered into an agreement in May, 1977, by which approximately one-third of the instrumentation project would be refabricated and reinstalled by personnel of Youngstown, with the assistance, as needed, of the personnel of Pierce. This agreement was without prejudice to the rights of either party regarding ultimate liability for the problems which had been encountered with the initial fabrication and installation. This one-third of the instrumentation project was refabricated and reinstalled during the summer months of 1977, and on completion, the reinstallation passed all pressure tests to the satisfaction of the District of Columbia. Pierce later refabricated and reinstalled the remaining two-thirds of the instrumentation project, using fiberglass pipe and fittings manufactured by another company which was not a party to this case.

Pierce brought suit against Youngstown and Byerly, contending that the written and verbal fabrication and installation instructions accompanying the Youngstown pipe and fittings were faulty and were the proximate cause of its damages. At the trial, the United States District Court for the District of Columbia charged the jury that it could find for Pierce on any of three alternative theories of recovery: breach of contract, breach of express and implied warranties, and negligence. A general verdict was returned by which the jury found in favor of Pierce and awarded damages in the amount of $151,796.00. The verdict did not indicate upon which theory or theories of recovery the jury based its verdict. Judgment on the verdict was entered by the district court on August 28, 1979, a copy of which is included in the appendix hereto. On September 10, 1979, the district court entered an

Order correcting the Judgment to reflect some $2,784.51 owed to Byerly by Pierce. A copy of this Order is included in the appendix hereto. The petitioners' Motion for Judgment Notwithstanding the Verdict and, in the alternative, for New Trial, was overruled by the district court's Order of September 17, 1979. Copies of the Motion and Order are included in the appendix hereto.

Youngstown and Byerly appealed to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals, in an unreported opinion dated December 1, 1980, affirmed the district court's judgment in favor of Pierce. Thereafter, a timely petition for rehearing was filed and was overruled by the court of appeals on December 30, 1980.

II.

A contention made by Youngstown and Byerly before the court of appeals was that the district court had erred in instructing the jury that it could find for Pierce if it found that the pipe and fittings sold by Youngstown and Byerly to Pierce failed to meet the specifications of the contract between the parties. The evidence at trial conclusively showed that it was the fabrication instructions of which Pierce complained, and not the pipe and fittings themselves. In fact, Pierce's witnesses admitted at the trial that there was nothing wrong with the pipe and fittings in themselves. In addition, during a conference with the court regarding the charge to the jury, counsel for Pierce stated on several occasions that no contention was being made that the pipe and fittings in themselves did not meet the contract specifications. Thus, Youngstown and Byerly argued that it was error for the district

court to allow the jury to find for Pierce if the jury found that the pipe and fittings themselves failed to meet the specifications of the contract.

In its unreported opinion, the court of appeals held that Youngstown and Byerly had waived this point of error inasmuch as they had submitted similarly worded instructions to the court before the trial of the case. Further, the court of appeals held that the objection made by Youngstown and Byerly to the court's charge to the jury was insufficient to properly preserve this question for appellate review.

III.

In the district court and on appeal Youngstown and Byerly also contended that the contract between the parties expressly excluded any and all express and implied warranties. However, in its unreported opinion, the court of appeals did not, at any point, speak to this issue, nor did the court of appeals speak to the issue of whether it was error for the district court to charge the jury that it could return a verdict in Pierce's favor if it found that Youngstown and Byerly had breached an implied warranty that the pipe and fittings were fit for the particular purpose for which they were intended.

REASONS FOR GRANTING THE WRIT

I.

The record as a whole shows that Youngstown and Byerly did not invite the district court to erroneously charge that the jury could find for Pierce if it found that the pipe and fittings alone did not meet the contract

specifications. As evidence of this fact, there is included in the appendix hereto portions of the record of the conference between the district court and counsel regarding the charge to be given to the jury.

In an Order signed by United States District Judge June L. Green on May 9, 1979, the parties to this cause were ordered to submit their pre-trial statements to the court at least two days before the pre-trial conference scheduled for June 26, 1979. In this Order, Judge Green stated that the following was to be included in the pre-trial statement:

> "Finally, if the case is to be tried to a jury, counsel for each of the parties shall prepare a *complete* set of jury instructions and shall file these with the court, in duplicate, and serve them on opposing counsel not later than two days before trial." (emphasis added)

In compliance with this Order, Youngstown and Byerly filed with the court, *before* trial, a document entitled "Defendants' Request for Jury Instructions." Included in this document was the following form of instruction to the jury:

> "XI.
>
> "With regard to the claim of the plaintiff against the defendant, Youngstown Sheet and Tube Company, you are instructed to find for the plaintiff if you find from a preponderance of the evidence that this defendant failed to provide pipe and fittings which met the requirements of the defendants' proposal and the plaintiff's purchase order and that such was a proximate cause of the plaintiff's damages, *and* if you find that the plaintiff's personnel did not fail

> to follow the written and verbal instructions given to them by representatives of this defendant, or if you find that plaintiff's personnel did fail to follow such written and verbal instructions, that such failure was not a proximate cause of the plaintiff's damages. If you do not so find, you are instructed to find for the defendant Youngstown Sheet and Tube Company. . . ."
> (emphasis added)

Requested instruction X was identical to requested instruction IX except that it applied to Byerly rather than Youngstown as the defendant.

In the instructions actually submitted by the district court, the jury was charged, in part, as follows:

> "If you find from a preponderance of the evidence that the pipe and fittings failed to meet the specifications of the contract, and that this failure proximately caused plaintiff's damages, and that plaintiff followed the verbal and written instructions provided by defendants, then plaintiff is entitled to a verdict in its favor. . . ."

The court of appeals held that the claim of Youngstown and Byerly that the above portion of the district court's charge was not supported by the evidence and thus should not have been submitted to the jury was waived by paragraphs IX and X of Defendants' Request for Jury Instructions.

The district court had ordered counsel for each party to submit a "complete set of jury instructions" two days before trial. At this point in time, counsel for Pierce and Byerly were faced with the possibility that the evidence at trial might be sufficient to raise an issue as to whether

the pipe and fittings themselves failed to meet the contract specifications. As shown in the portions of the record included in the appendix, Pierce had, during discovery, obtained evidence of the difference in two versions of the fitting sockets, one with a smooth exterior and the other with a sandblasted exterior. The inference drawn from this evidence was that Pierce could contend at trial that the fitting sockets with the smooth exterior did not meet the contract specifications. Thus, in proposing its instructions IX and X, Pierce and Byerly were concerned that if this evidence was raised at trial that properly worded instructions on this issue be submitted to the jury.

However, by the conclusion of the evidence, it was apparent that a jury issue as to this theory had not been raised. Thus, as shown by the record of the conference between the court and counsel prior to the submission of the case to the jury, counsel for Youngstown and Byerly, on several occasions, objected to the submission of any instructions which would permit the jury to find for Pierce if it found that the pipe and fittings themselves alone failed to meet the contract specifications. Counsel for Pierce, at several points during this conference, advised the court that Pierce no longer contended that there was any problem with the pipe and fittings themselves, but that the problem was with the verbal and written fabrication instructions furnished by Youngstown and Byerly.

Based upon this record, the court of appeals was in error in holding that Youngstown and Byerly had not properly objected to this instruction and in intimating that Youngstown and Byerly had invited this error by its requested instructions IX and X.

The facts of this case bear substantial similarity to those in *Alabama Great Southern R. Co. v. Johnson,* 140 F.2d 968 (5th Cir. 1944), a wrongful death case brought by the survivors of two young boys who were killed on a public railroad crossing. In that case, the trial court instructed the jury that it could include, as an element of damages, such " 'amount of money that the evidence shows that these boys might have voluntarily contributed to their parents after they reached twenty-one years of age.' " The district court justified the giving of this instruction on the ground that the language had been taken from one of the defendant's requested special instructions.

The court of appeals reversed, holding that there was no evidence to justify the submission of this element of damages to the jury and that the defendant had not invited this error such as to estop it from claiming the error on appeal.

On examining the record in *Johnson,* the court of appeals found that although the defendant had initially requested the instruction in question, its counsel had also objected to its submission to the jury when it was apparent that there was no evidence to justify its submission. In the course of its opinion, the court of appeals stated the following:

> "The doctrine that there shall be no reversal for invited error is, when justly and correctly applied, a wise and wholesome one. Based as it is, on estoppel, it finds its justification only when facts exist which raise an estoppel. . . . If defendants had not timely objected to it as incorrect, they could not have complained here of the instruction as error. But they did timely object. . . . Rules which were adopted with the express purpose of relieving liti-

> gants from traps and pitfalls and procrustean rulings or results may not be applied, as they have been here, to produce them. . . ."
> 140 F.2d at 971-72.

In the case now before this Court, the record shows that the district court was fully aware of petitioner's objection to the instruction on the pipe and fittings. Yet the district court instructed the jury that quite apart from any alleged fault in the fabrication instructions, it could find for Pierce if it found that the pipe and fittings *themselves* failed to meet the contract specifications. The district court so instructed the jury despite the fact that Pierce had admitted that nothing was wrong with the pipe and fittings.

The court of appeals sought to justify its holding by stating that the objections made by counsel for Youngstown and Byerly just prior to the submission of the case to the jury were tied only to the express and implied warranty theories of recovery and not to the issue of whether the pipe and fittings failed to meet the specifications of the contract. However, as is evident from the record of the previous conference between the district court and counsel, Youngstown and Byerly made it abundantly clear that they objected to the submission of this theory of recovery because there was no evidence to support it.

In obeying the mandate of the district court to submit a complete set of jury instructions before trial, Youngstown and Byerly have, by the holding of the court of appeals, become victims of the "traps and pitfalls" which, according to the court in the *Johnson* case, supra, the Federal Rules of Civil Procedure were adopted to prevent.

140 F.2d at 972. The court of appeals has sidestepped the issue by holding, in effect, that Youngstown and Byerly "invited" the error. Since the net result of the holding of the court of appeals is to deny Youngstown and Byerly their right to appellate review as to this issue, the judgment of the court of appeals should be reversed and the cause remanded to that court. The holding of the court of appeals is clearly in conflict with the Fifth Circuit's decision in *Johnson,* supra, for in the case now before this Court, the petitioners' right to appellate review has been denied because of a superficial application of the "invited error" doctrine which failed to consider the totality of the record from the district court.

II.

The court of appeals also held that the objections made by Youngstown and Byerly to the court's charge to the jury were not sufficient to preserve for appellate review the question of whether the district court erred in allowing the jury to find for Pierce if it found that the pipe and fittings failed to meet the specifications of the contract between the parties. Once again the court of appeals avoided a substantive review of the question and ruled against Youngstown and Byerly on this procedural point. Petitioners submit, however, that this issue was preserved for appellate review by their Motion for Directed Verdict and that no further objection was necessary.

At the conclusion of all the evidence, Youngstown and Byerly presented the following motion to the district court:

> "After the conclusion of all of the evidence and after all parties have rested their case, the defendants

> respectfully move the court to dismiss the plaintiff's case because that case, as specifically pled by plaintiffs, encompasses the conditions of sale and trade customs made a part of the contract between the parties for the sale of the goods in question and those conditions of sale and trade customs specifically provide—and can we have another paragraph 4 of the conditions as stated further, because there is no evidence upon which the jury might find for the plaintiff on any of the bases of liability asserted in the plaintiff's complaint or in any proceedings herein."

This motion was denied by the district court. Thereafter, Youngstown and Byerly made objections to the district court's instructions to the jury:

> "Defendants object to the court's instruction to the jury in connection with the plaintiff's claim under an express warranty and implied warranty and for negligence, because in each case the court instructed the jury that in order for the defendant to have defeated such claim it must have proved that plaintiff's personnel did not follow the written and verbal instructions given them when, as a matter of fact, it is completely possible that plaintiff is not entitled to recover either by reason of the express warranty, implied warranty or negligence claim of the plaintiff when the plaintiff's personnel may have for some reason not followed such instruction. The defendants further [interposition by the court] object to the instructions given the jury with respect to express and implied warranty of pipe and fittings because the evidence in this case conclusively establishes that there was no deficiency in pipe and fittings as such instructions would allow the jury to find for the plaintiff on the basis of pure speculation."

The court of appeals held the foregoing objection to the court's instructions to the jury was not sufficient to preserve this issue for appellate review, completely ignoring the Motion for Directed Verdict made by Youngstown and Byerly at the conclusion of all of the evidence.

In *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir. 1972), two of the defendants asserted on appeal that they had been entitled to a directed verdict on the plaintiff's claim that they were the alter ego of the third defendant. The trial court denied the Motion for Directed Verdict, but the two defendants made no objection to the trial court's instructions to the jury on the alter ego theory. The Fifth Circuit held that error as to the alter ego theory had been properly preserved, and stated the following:

> "Neither Koscot nor Turner objected to the instrucitons to the jury on the theory of alter ego. However, this omission does not prevent them from now raising the denial of their motion for a directed verdict on this issue, nor does the failure to object to the instructions make the trial judge's statement of the applicable law the 'law of the case' for purposes of review of the Motion for a directed verdict. *'A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury.'* "
> 468 F.2d at 65-66
> (emphasis added)

This rule was stated in substantially similar language in the earlier case of *Coca Cola Bottling Co. v. Hubbard*, 203 F.2d 859 (8th Cir. 1953).

In *Vergott v. Deseret Pharmaceutical Co.*, 463 F.2d 12 (5th Cir. 1972), the plaintiff brought suit against Deseret and others claiming that an intracath unit manufactured by Deseret was defective and that the nurse who performed the catheter procedure was negligent. Before trial, the plaintiff dismissed the nurse's employer from the suit, but Deseret kept the employer in the case by its third party action. The jury found that the intracath unit was defective and found that the nurse performing the procedure was negligent, but that her negligence was not a proximate cause of plaintiff's injuries.

On appeal, Deseret contended that as a matter of law, the negligence of the nurse was a proximate cause of plaintiff's injuries. The court of appeals refused to review this matter, stating the following:

> "Deseret argues that, as a matter of law, the negligence of the nurse was a proximate cause of Vergott's injuries. This, of course, is tantamount to saying that the evidence was insufficient to take the case to the jury. *The short answer to this is that we will not review the sufficiency of the evidence when no motion for a directed verdict was made in the trial court. . . . Deseret made no such motion below.*"
>
> 463 F.2d at 15
> (emphasis added)

The court of appeals in *Vergott* did not state that an objection to the special interrogatory inquiring as to the nurse's negligence and as to proximate cause was required to preserve error. It stated that a motion for directed verdict was the proper method of preserving this point of error. Similarly, in the case now before this court, since a motion for directed verdict was made at the close

of Pierce's evidence, the question of whether there was sufficient evidence to support the submission of the theory of recovery in question to the jury was properly preserved for appellate review and the court of appeals erred in refusing to consider it.

In *Little v. Bankers Life & Casualty Co.*, 426 F.2d 509 (5th Cir. 1970), the plaintiff was the beneficiary under an accidental death policy issued by defendant. The insurer defended on the basis of an exclusion in the policy which denied benefits if the death of the insured was by suicide. Special interrogatories were submitted to the jury which inquired as to whether the death of the insured was the result of suicide rather than accidental bodily injury. The jury's verdict favored the insurer. On appeal, the plaintiff challenged the sufficiency of the evidence supporting the submission of the cause of death issue to the jury. The court of appeals refused to review that point of error, and stated the following:

> "In this Circuit it is well established that the sufficiency of the evidence supporting jury submission of a case or the jury's findings is not reviewable on appeal unless the party seeking review has made a motion for a directed verdict in the trial court. . . . The reasons behind the rule are sound. For example, a litigant may not gamble on the jury's verdict and then later question the sufficiency of the evidence on appeal. . . . Similarly, the litigant who has not moved for a directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view. . . .
>
> 426 F.2d at 510-11

Again, the court of appeals did not state that an objection to the special interrogatory was required as a predicate for reviewing the sufficiency of the evidence to support submission to the jury. It specifically stated that the proper method of preserving this error was by a motion for directed verdict.

Petitioners submit that a motion for directed verdict was all that was required to preserve for appellate review the question of whether there was sufficient evidence to submit to the jury a theory of recovery which allowed Pierce to recover if the jury found that the pipe and fittings themselves did not meet the specifications of the contract. This is clearly supported by the First Circuit's decision in *International Business Machines Corp. v. Catamore Enterprises, Inc.*, 548 F.2d 1065 (1st Cir. 1976), cert. denied 431 U.S. 960 (1977). This was a rather complex case involving an initial effort by IBM to collect on Catamore's open account with it. Catamore counterclaimed on theories of breach of contract, negligence, and other theories of recovery against IBM.

One of Catamore's claims was grounded on the theory of negligence, and on appeal, IBM contended that the evidence was insufficient to submit the negligence theory to the jury. A footnote in the court's opinion is instructive as to what steps IBM should have taken to properly preserve this point for review:

> "IBM failed to take the steps required to preserve its substantive objections to Catamore's negligence claim. It neither moved for a directed verdict on the negligence counterclaim nor objected generally to the trial judge's instructions on this theory. However, it did belatedly raise its objections when it moved for a new trial following the jury verdict. Insofar as

> IBM's present objections amount to the claims that instructions to the jury were erroneous, it is precluded from obtaining appellate review because it did not present the objections to the trial court. The motion for a new trial alone is insufficient to place these issues before this court. . . . *Insofar as IBM's claim may be characterized as an attack on the sufficiency of the evidence of negligence, its failure to move for a directed verdict bars it from obtaining normal appellate review.* . . ."
>
> 548 F.2d at 1072 n. 14 (emphasis added)

As the above quoted portion of the *IBM* opinion indicates, it is only when the complaining party feels that the instructions to the jury are erroneously worded, or are incomplete, or in some other way faulty that objections to the instructions are required to obtain appellate review. When the question for review is whether the evidence is sufficient to submit the theory of recovery to the jury, a motion for directed verdict will properly preserve the question for review on appeal.

In the case now before the court, not only did Youngstown and Pierce move for a directed verdict on the ground that the evidence was insufficient to submit any of the theories of recovery to the jury, it also made its position quite clear to the district court during the conference between the court and counsel when the court's charge to the jury was formulated. The district court was aware that Youngstown and Pierce contended that no evidence had been introduced which would support a finding by the jury that the pipe and fittings themselves were not in accordance with the specifications of the contract and that Pierce's counsel himself admitted that Pierce was making no such claim. Thus, the court of appeals has on a preliminary procedural ground refused

to consider the contentions brought forth by Youngstown and Byerly on this point of error. It was incorrect in doing so, and therefore, this cause should be remanded to the court of appeals for consideration of this question.

III.

In the district court, one of Pierce's three alternate theories of recovery was breach of express or implied warranties under Article 2 of the Uniform Commercial Code. D.C. Code §§ 28:2-314 and 2-315. Pierce claimed that such warranties were as to the adequacy of the fabrication instructions given by Youngstown and Byerly, the fitness of the pipe and fittings for the particular purpose for which they were intended, and whether a successful installation would result from following the fabrication instructions. Youngstown and Byerly defended these claims by asserting, *inter alia,* that the contract between the parties specifically excluded any and all express and implied warranties.

No contention was made, either in the district court or before the court of appeals, that the warranty disclaimer was not conspicuous as required by D.C. Code § 28:2-316(2), or that merchantability was not mentioned. Also, Pierce admitted that it was not seeking recovery on a theory that any express or implied warranties had been breached as to the pipe and fittings themselves, separate and apart from the fabrication instructions. Pierce's sole answer to the warranty disclaimer defense was that it covered only the pipe and fittings and not the installation instructions, relying on the Fifth Circuit's opinion in *Texsun Feed Yards Inc. v. Ralston Purina Co.,* 447 F.2d 660 (5th Cir. 1971), discussed *infra,* to support this proposition.

The district court nevertheless submitted the warranty theory to the jury as an independent basis for a verdict in Pierce's favor. Its instructions to the jury in this regard are reproduced in the appendix herein. The court of appeals, in its unreported opinion, made only one reference to this matter in a footnote to the final sentence of the opinion (See appendix hereto).

The warranty disclaimer relied upon by Youngstown and Byerly reads as follows:

> 4. Seller warrants goods of its own manufacture against defects in material and workmanship only, for a period of ninety days from the date of purchase to the extent that it will replace such goods f.o.b. point of manufacture, or allow credit therefor, at its election, when such goods are in the hands of the original purchaser and used in normal use and service. Other goods are warranted only to the extent of the express warranty of the manufacturer thereof and to the extent such is enforceable by the Seller. NO WARRANTY EITHER EXPRESS OR IMPLIED IS MADE BY SELLER AS TO THE FITNESS, MERCHANTABILITY, CONDITION, CAPACITY OR EFFICIENCY OF ANY GOODS SOLD, and no claims for labor or for consequential damage will be allowed. The Seller shall be notified promptly of any material claimed to be defective and such material shall be subject to inspection by the Seller. No material may be returned for credit or replacement except by special arrangement. SELLER'S LIABILITY IS LIMITED AS SET FORTH AND THE REMEDY HEREIN PROVIDED FOR THE BUYER IS EXCLUSIVE OF ALL OTHERS.
>
> (emphasis original)

Pierce's contention in the lower courts was that because the disclaimer language did not specifically mention the fabrication instructions, it did not apply to the instructions.

The treatment accorded this question by the court of appeals is superficial, at best, as illustrated by the case it cited, *Potler v. MCP Facilities Corp.*, 471 F. Supp. 1344, 1350-51 (E.D. N.Y. 1979). In that case, a company had contracted and agreed to apply underwater paint to facilities owned by Bethlehem Steel Corporation in Beaumont, Texas. When the paint failed to adhere, the plaintiff sued, among others, the seller of the paint and contended that the seller had breached express and implied warranties as to the paint.

The portions of the *Potler* opinion referred to by the court of appeals in the case now before this Court, 471 F. Supp. at 1350-51, accomplish nothing toward resolving the question of whether the warranty disclaimer language pertained to *both* the pipe and fittings *and* the installation instructions. In *Potler,* the district court properly held that the disclaimer there in question failed to mention "merchantability," and thus, the implied warranty of merchantability was not effectively disclaimed. 471 F. Supp. at 1350. The district court also held that the defendant's brochure and the representations contained therein were inconsistent with the defendant's attempted warranty disclaimer and, therefore, the disclaimer was inoperative. 471 F. Supp. at 1351. No such contention has been made by Pierce in the case now before this Court. Nowhere in the *Potler* opinion does the district court deal with the question of whether a warranty disclaimer extended to *both* the product *and* the instructions accompanying the product.

Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660 (5th Cir. 1971), relied on by Pierce in the district court, supports the proposition that the product and accompanying instructions are to be treated as one for creation of U.C.C. warranty purposes *and* for warranty disclaimer purposes. In *Texsun,* the plaintiff contended that the instructions for use of a feed ration supplement were defective and thus, that the defendant had breached the warranties applicable to the sale of the product. The Fifth Circuit agreed that the instructions should be considered a part of the product for warranty purposes, and stated the following:

> "It is commercially unrealistic to treat separately the sale of the ration supplement and the rendering of professional advice and assistance."
> 447 F.2d at 668

If the product and instructions are to be considered as one for purposes of creating warranties, then they should be considered as one for purposes of disclaiming warranties.

The Uniform Commercial Code, specifically D.C. Code §§ 28:2-314 and 2-315, does not use the term "instructions" in dealing with the creation of warranties. Therefore, the term "instructions" should not have to be used in order to give rise to an effective disclaimer of warranties, particularly so if the "goods" and the accompanying "instructions" are to be treated as one commercial package.

The warranty exclusionary language employed by Youngstown and Byerly met the requirements of D.C. Code § 28:2-316. It was conspicuous and was in writing. See *Childers & Venters, Inc. v. Sowards,* 460 S.W.2d 343

(Ky. Ct. App. 1970); *Beal v. General Motors Corp.*, 12 U.C.C. Reptg. Service 78 (D. Del. 1972). Pierce admitted it was sufficient to exclude any express or implied warranties as to the pipe and fittings. Although the district court did not charge the jury on the implied warranty of merchantability, the exclusionary language mentioned merchantability.

IV.

As set forth above, Youngstown and Byerly argued in the district court and before the court of appeals that since the evidence was conclusive that nothing was wrong with the pipe and fittings themselves, it was erroneous to submit a theory of recovery which allowed the jury to return a verdict in Pierce's favor if it found that the pipe and fittings failed to meet the specifications of the contract. Similarly, it was error for the district court to charge the jury that it could return a verdict in Pierce's favor if it found that Youngstown and Byerly had breached an express warranty that the pipe and fittings were fit for the particular purpose for which they were intended. If nothing was wrong with the pipe and fittings, then even if such an implied warranty was given it was not breached.

A warranty is not breached when the product fails for a reason other than the quality of the product itself. For example, in *Mitchell Pallet and Lumber Co. v. Kockum Industries, Inc.*, 340 F. Supp. 389 (E.D. Mo. 1972), the plaintiff claimed that because a wood chipper purchased from the defendant did not work properly, the defendant had breached its warranty that " 'the chipper will do the job.' " 340 F. Supp. at 390. However, the evidence showed that nails were in the wood being fed

into the chipper and that in many instances the wood itself was seasoned and thus, too hard. The court held that there was no breach of warranty.

According to the district court's instructions to the jury, in the case now before this Court, the jury was free to find that the pipe and fittings were not fit for the particular purpose for which they were intended when there was no evidence that anything was wrong with the pipe and fittings themselves. If the jury further found that Pierce's personnel followed the fabrication instructions, Pierce was entitled to a verdict in its favor. The jury *was not* required to also find that the fabrication instructions were defective or incomplete. Thus, it was possible for the jury to find that the implied warranty had been breached when the products covered by that implied warranty, the pipe and fittings, were admittedly not defective.

Before a purchaser can recover on a theory of breach of implied warranty, whether it be the implied warranty of merchantability or fitness for a particular purpose, that purchaser must prove the existence of some defect in the product at the time the product leaves the hands of the manufacturer. *Holcomb v. Cessna Aircraft Co.*, 439 F.2d 1150 (5th Cir.), *cert. denied* 404 U.S. 827 (1971); *Elliott v. Lachance*, 256 A.2d 153 (N.H. 1969). In the case now before this Court, Pierce failed to prove this, so that the jury should not have been allowed to return a verdict in Pierce's favor on this theory of recovery *and* according to the instructions given it by the district court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

JEFF CRANE
MICHAEL E. ALEXANDER
VINSON & ELKINS
First City National Bank Bldg.
Houston, Texas 77002
(713) 651-2298

By: _____
MICHAEL E. ALEXANDER
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March, 1981, three copies of the Petition for Writ of Certiorari were hand delivered to Jack Rephan, Esq., Braude, Margulies, Sacks & Rephan Chartered, 1828 L Street N.W., Suite 900, Washington, D. C. 20036, Counsel for the Respondent. I further certify that all parties required to be served have been served.

MICHAEL E. ALEXANDER
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Houston, Texas 77002
(713) 651-2298

Counsel for Petitioners

APPENDIX

No. 79-2217

Pierce Associates, Inc.

v.

Youngstown Sheet & Tube Company, *et al.*

MEMORANDUM

Plaintiff-appellee Pierce Associates, Inc. (Pierce) was the mechanical contractor for the District of Columbia in the construction of a portion of the Blue Plains sewage treatment plant. Following solicitations from defendants Youngstown Sheet & Tube Company, a manufacturer, and T. E. Byerly & Co., a distributor, Pierce agreed to purchase fiberglass-reinforced pipe and fittings from defendants for use in the plant. The parties' agreement incorporated by reference various specifications required by the District of Columbia. One specification required the fittings, upon installation, to pass certain pressure tests. Another specification required defendants to provide competent on-site representatives and instructions for proper installation. Youngstown's printed form specifying terms of sale stated in capital letters that "no warranty . . . is made by the seller as to . . . any goods sold."

After most of the installation was completed, pressure tests indicated unacceptable results. By special agreement, Youngstown undertook the refabrication and reinstallation necessary to the successful operation of the pipe and fittings. This agreement preserved each party's rights as to liability for the original mishap.

Pierce brought this diversity action alleging breach of contract, breach of warranty and negligence. Judgment was entered upon a general verdict awarding Pierce $151,796. District Judge June Green corrected the judgment to reflect $2,784.51 owed to T. E. Byerly by Pierce, and denied defendants' motion for judgment notwithstanding the verdict or for a new trial.

We have accorded full consideration to the issues raised by defendants and conclude they occasion no need for an opinion. *See* Rule 13(c), General Rules of the United States Court of Appeals for the District of Columbia Circuit. This memorandum addresses concisely two attacks on the District Court judgment presented with vigor in the briefs and at oral argument.

Here, as in the District Court, defendants raise the legal question whether there was enough evidence to make an issue for the jury. Upon review of the record, we find no error in Judge Green's conclusion that substantial evidence supported plaintiff's central contention that the installation instructions were inadequate to assure successful operation of the pipe and fittings.

Defendants challenge a particular jury instruction as inviting a verdict based on defects in the pipe and fittings, without more. In fact, plaintiff claimed no defects in the goods supplied separate and apart from the mode of installation. Assuming *arguendo* that the instruction pinpointed on appeal was flawed, the alleged error would not warrant overturning the District Court's judgment.

The instruction now assailed closely resembles requested instructions IX and X offered by *defendants* prior to trial. J.A. 43-44. Defendants did not endeavor to

withdraw the requested instructions as the trial progressed. Nor did they do so when Judge Green gave them an opportunity to be heard prior to her charge. J.A. 666. Defendants did raise objections to instructions after the charge, but not in a manner adequate to alert Judge Green to the point now pressed. The instruction pinpointed here appears in the portion of the charge relating to breach of contract liability. J.A. 672. Defendants' post-charge objections, however, indicated breach of warranty and negligence instructions as faulty. J.A. 678-79. Fed. R. Civ. P. 51 precludes us from considering an alleged jury instruction error when the party claiming error failed to state "distinctly the matter to which he objects and the grounds of his objection."

We find no other error or defect in anything done or omitted by Judge Green* that would warrant disturbing the judgment entered in the District Court. Accordingly, that judgment is

Affirmed.

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* As to plaintiff's position that the warranty disclaimer did not encompass defendants' undertaking to provide instructions adequate to assure successful operation of the pipe and fittings, see, *e.g.*, the clear analysis in Potter v. MCP Facilities Corp., 471 F. Supp. 1344, 1350-51 (E.D.N.Y. 1979).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CO-158
New 11/74

CIVIL NO. 79-49

PIERCE ASSOCIATES, INCORPORATED
Plaintiff

v.

YOUNGSTOWN SHEET AND TUBE
AND T. E. BYERLY COMPANY
Defendants

(Filed August 28, 1979)

JUDGMENT ON THE VERDICT
(For Plaintiff)

This cause having been tried by the Court and a Jury, before the Honorable JUNE L. GREEN, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff PIERCE ASSOCIATES, INCORPORATED have and recover of and from the defendants YOUNGSTOWN SHEET AND TUBE AND T. E. BYERLY COMPANY the sum of ONE HUNDRED FIFTY ONE THOUSAND SEVEN HUNDRED AND NINETY SIX DOLLARS ($151,796.00), together with costs.

JAMES F. DAVEY, Clerk

By: /s/ ELLEN M. HERBERT
Deputy Clerk

Dated: August 28, 1979

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 79-0049

PIERCE ASSOCIATES, INC.

v.

YOUNGSTOWN SHEET & TUBE COMPANY, INC.
d/b/a FIBERCAST COMPANY, a Division of
Youngstown Sheet and Tube Company, Inc.
and T. E. BYERLY COMPANY

(Filed September 11, 1979)

ORDER

Upon consideration of Defendants' Motion for Correction of Judgment, it is hereby ORDERED that the Judgment on the Verdict (for Plaintiff) dated August 28, 1979, is amended to reflect the $2,784.51 owed by Plaintiff to Defendant, T. E. Byerly Company.

Signed this 10th day of Sept., 1979.

/s/ JUNE L. GREEN
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 79-0049

PIERCE ASSOCIATES, INC.

v.

YOUNGSTOWN SHEET & TUBE COMPANY, INC.
d/b/a FIBERCAST COMPANY, a Division of
Youngstown Sheet and Tube Company, Inc.
and T. E. BYERLY COMPANY

(Filed September 7, 1979)

DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT AND,
IN THE ALTERNATIVE, DEFENDANTS'
MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now come YOUNGSTOWN SHEET & TUBE COMPANY and T. E. BYERLY COMPANY, Defendants in the above entitled and numbered cause, and make this their Motion for Judgment Notwithstanding the Verdict and, In the Alternative, Their Motion for New Trial and as grounds therefor, would respectfully show the Court the following:

I.

Defendants move the Court to set aside the verdict entered in the above entitled and numbered cause on

August 28, 1979, and to enter judgment in favor of the Defendants in accordance with the Motion for Directed Verdict made by the Defendants at the close of the Plaintiff's testimony herein, and the Motion for Directed Verdict made at the conclusion of all the evidence and when all parties had rested on the grounds, as stated in that Motion as follows:

(A) The evidence was conclusive that any express or implied warranty was expressly excluded by the contract between Plaintiff and the Defendants.

(B) There was absolutely no evidence introduced by Plaintiff at the trial of this cause of any negligence on the part of either of the Defendants.

(C) It was undisputed that the pipe and fittings sold by Defendants to Plaintiff conformed to the specifications of the contract, were fit for the purpose for which they were intended and were merchantable. These facts were expressly admitted by Plaintiff.

II.

The Court submitted this case to the jury on three basic theories of recovery and further instructed the jury that they were to find for the Plaintiff if they found for the Plaintiff on any one of those three theories. These three theories were breach of express warranty, breach of implied warranty, and negligence. As stated above, the evidence was conclusive that any express or implied warranty was expressly excluded by the contract between Plaintiff and the Defendants. As to negligence, there was

absolutely no evidence introduced by Plaintiff of any negligence on the part of either of the Defendants. Accordingly, the jury's verdict should be disregarded and judgment should be entered that Plaintiff take nothing.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that the Court disregard the verdict of the jury entered on August 28, 1979, that the Court render judgment notwithstanding the verdict that Plaintiff take nothing of and from Defendants, and for such other and further relief to which Defendants may show themselves justly entitled.

III.

In the alternative to the foregoing Motion for Judgment Notwithstanding the Verdict, Defendants move this Honorable Court to set aside the verdict and the judgment entered thereon and grant them a new trial for any or all of the following reasons:

(A) The verdict is contrary to law.

(B) The verdict is contrary to the weight of the evidence.

(C) The Court erred in instructing the jury that Plaintiff was entitled to a verdict in its favor if the jury found that "Defendants impliedly warranted that its pipe and fittings were fit for the particular purpose for which they were intended, that the pipe and fittings were not fit for the purpose for which they were intended, and that Plaintiff's personnel followed the written and verbal instructions of the pipe and fittings. . . ." It was ex-

pressly admitted by the President of Plaintiff that there was nothing wrong with the pipe and fittings. Accordingly, it was error for the Court to instruct the jury that it could find for the Plaintiff if the jury found that the pipe and fittings were not fit for the purpose for which they were intended inasmuch as there was absolutely no evidence introduced other than that the pipe and fittings were satisfactory and were fit for the purpose for which they were intended.

(D) The weight of the evidence establishes that the pipe and fittings were fit for the purpose for which they were intended, that any and all express and implied warranties as to either the pipe and fittings or the instructions accompanying same were expressly excluded by the contract between the Plaintiff and the Defendants, and that there was no negligence on the part of either of the Defendants.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court set aside the verdict of the jury and the judgment entered thereon and that the Court

grant them a new trial, and for such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

VINSON & ELKINS

By: /s/ CHARLES D. TETRAULT
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OF COUNSEL

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-49

PIERCE ASSOCIATES, INC.
Plaintiff

v.

YOUNGSTOWN SHEET & TUBE
COMPANY, INC., et al
Defendants

ORDER

Upon consideration of defendants' motion for judgment notwithstanding the verdict and, in the alternative, defendants' motion for new trial, it is by the Court this 17th day of September 1979,

ORDERED that defendants' motion is hereby denied.

/s/ JUNE L. GREEN
June L. Green
U.S. District Judge

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1980

(No Opinion)

Civil Action No. 79-0049

(Filed December 1, 1980)

No. 79-2217

PIERCE ASSOCIATES, INC.

v.

YOUNGSTOWN SHEET AND TUBE COMPANY, INC.,
d/b/a Fibercast Company, a Division of Youngstown Sheet and Tube Company, Inc., an Ohio Corporation and T. E. Byerly Company, a Maryland corporation,
Appellants

Appeal from the United States District Court for the District of Columbia.

Before: J. EDWARD LUMBARD,* Circuit Judge, United States Court of Appeals for the Second Circuit and ROBB and GINSBURG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the attached memorandum.

PER CURIAM

For the Court

/s/ GEORGE A. FISHER
George A. Fisher, Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1980

Civil Action No. 79-0049

(Filed December 30, 1980)

No. 79-2217

PIERCE ASSOCIATES, INC.

v.

YOUNGSTOWN SHEET AND TUBE COMPANY, INC.,
d/b/a Fibercast Company, a Division of Youngstown Sheet and Tube Company, Inc., an Ohio Corporation and T. E. Byerly Company, a Maryland corporation,
Appellants

ARGUED 10-28-80

Before: Lumbard*, Circuit Judge, United States Court of Appeals for the Second Circuit, Robb and Ginsburg, Circuit Judges.

ORDER

On consideration of appellants' petition for rehearing, filed December 12, 1980, it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

ORDERED by the Court that the aforesaid petition is denied.

PER CURIAM

For the Court
George A. Fisher, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

MR. REPHAN: It would not apply in a breach of contract situation, but only a breach of warranty.

THE COURT: I think you are correct. It would only be the breach of warranty. I think that it certainly wouldn't be effective in a negligence case.

MR. REPHAN: I think it runs only to the goods, too, Your Honor, and not to the instructions themselves. This disclaimer relates only to the goods per se.

You often see, Your Honor, disclaimers of this sort where they will specifically disclaim any warranties in connection with instructions or sales literature and so on. It's not done in this case. It's only the goods, Your Honor.

Your Honor, we have not claimed that either the pipe or the fittings were the cause of the problem.

THE COURT: We have incorporated most of the other things until we get down to this, haven't we, of the defendants?

Maybe you can take them since you have been working on them.

Show them which ones you are talking about. It's simpler.

MR. REPHAN: If Your Honor please, I don't have any specific problems with any of the proposed instructions. It seems to me there should be an instruction, Your Honor, after reviewing the one you have on the counterclaim, with regard to the question of if the additional expenses incurred by Fibercast resulted from its own negligence with breach of contract or breach of warranty, necessitating it to come back to the job, they

should not recover on this counterclaim. I don't think that situation is covered by the instructions.

THE COURT: Do you have any comments?

MR. CRANE: Yes, Your Honor. At the very beginning of the instructions there is an instruction to the jury that the plaintiff was bound to install the pipe and fittings in accordance with defendants' instructions. And we just don't—we think the plaintiff could have done anything he wanted to with his property after he bought and paid for it. We don't think he had to follow anybody's instructions.

MR. REPHAN: If Your Honor please, I think that was a prime contract requirement in the specifications that it be installed in accordance with the manufacturer's recommendation.

MR. CRANE: We haven't seen that, Your Honor.

MR. REPHAN: We have the specifications here.

MR. CRANE: I haven't seen any prime contract.

THE COURT: In this case there is no dispute that a contract for the sale of goods existed between plaintiff and defendants. I take it there is no problem that far?

MR. CRANE: No, Your Honor.

THE COURT: Wherein defendants promised to provide plaintiff with pipe and fittings for use in the construction of the Blue Plains Water Pollution Control Plant in the District of Columbia.

There is also no dispute that as part and parcel of this contract plaintiff was to fabricate and install the pipe

and fittings in accordance with the instructions provided by defendants. They were required to give five days of instructions of same, plus the manual, plus the movie.

MR. CRANE: Your Honor, that turns it around. That says that the plaintiff was required to install the pipe and fittings in accordance with the instructions. Plaintiff has no obligation at all.

THE COURT: Plaintiff was to fabricate and install the pipe and fittings in accordance with the instructions provided by defendants.

MR. CRANE: I don't know of any requirement of any kind that the plaintiff, Pierce Associates, was required to install anything according to anybody's instructions. They could have done anything they wanted to. It was their goods, their property. They didn't have to follow anybody's instructions.

THE COURT: Let's get on a little farther with it. You are claiming that they didn't and that is why you don't owe them anything?

MR. CRANE: No, Your Honor. We are claiming that we didn't give them any warranty of any kind. You see, this is the problem.

Pierce Associates could take their property when they bought it and paid for it and install it any way they wanted to and if it worked, that is fine. If it didn't work, then they had a problem. And the problem is whether or not there was a warranty extended by the manufacturer or the seller of these goods.

And our position is simply that there was no such warranty. It is excluded by the exculpatory provision in the contract of sale.

THE COURT: What about alleged negligence as to the manner in which they were told to do it?

MR. CRANE: Your Honor, if there was any such negligence, it would have to be a proximate cause, it would have to be a foreseeable cause of any damages that might be recovered. Certainly there is nothing in here that would indicate any damages at all that is foreseeable.

THE COURT: That is what makes a jury trial.

MR. CRANE: That would be pure speculation in this case, Your Honor.

MR. REPHAN: Your Honor, my response is simply to say that the specifications are full of references to the manufacturer's standards, "Laying length is specified as in the manufacturer's literature," and this is part of the prime contract.

The purchase order itself, Your Honor, says they were to furnish this material in strict accordance with the specifications and plans of the prime contract. This required all the requirements including on-the-job supervision.

They were not merely selling a can of adhesive and some pipe and fittings and saying, "On your way, Mr. Pierce." They had some contractual obligations.

THE COURT: Well, each of the witnesses for the defense has testified that indeed they gave instructions for this length of time as they were required to do and did it on every job.

MR. CRANE: Yes, ma'am. But that is not part of this contract.

THE COURT: I am inclined to disagree with you and then, of course, accordingly you may have your exceptions. But I am going to give that instruction.

MR. CRANE: All right.

THE COURT: I think that is covered. I think that what your client's company sold was a package of equipment, i.e., fittings, pipes, adhesives and instructions, and that somewhere along the line something didn't work. Maybe it was all the fault of the plaintiff.

The jury is going to be able to determine that. But they can't determine it in a vacuum and what we have before us is as indicated and spelled out in the contract, I believe, if you would like to show—

Mr. Rephan, if you would like to show counsel your portion of the contract where you think it spells it out and maybe he can tell the Court where he thinks it's omitted or doesn't apply to Youngstown.

MR. REPHAN: 15-T, here, laying pipe. I am reading from 15-T of the contract specifications, page 7:

"Piping and fitting to be cleaned of all debris and dirt before laying and kept clean throughout installation in accordance with pipe manufacturer's instructions for clean pipe when using adhesive."

This is butt and wrap joints.

All right, and then on page 15-T, page 9:

"Services of manufacturer's representatives. Manufacturer to provide competent representative five working days during important phases of pipe installation:

"A. Provide supervision;

"B. Train contractor's erection personnel in proper pipe assembly, hanging and installation;

"C. Representative present when first pipe joints are made as well as when more involved assemblies are made.

"2. For additional five days to instruct District personnel in making pipe joints and repair work;

"3. Manufacturer's representatives available if required to assist in correcting defective work and to asure that proper joints are being made."

And I think there are other references, Your Honor, in this section.

THE COURT: How do you think that omits the responsibility?

MR. CRANE: Your Honor, if this provides any responsibility at all on the part of the manufacturer, this is not what they are suing us about. They are not suing us because we were not out there for five days. And it wouldn't make a particle of difference in this case.

THE COURT: Are you suggesting that it would have met the terms of the contract if you had sent people out there and told them to stick them up with literally peanut butter?

MR. CRANE: No, Your Honor. But what we did—

THE COURT: You'd say, "Well, after all, we didn't have to tell them to do it right."

MR. CRANE: No. What we did was enter into a contract to do these things and the contract provides that

none of these things is warranted, either express or implied. If this warranty binds us to do them, then it binds them not to have a warranty.

THE COURT: How's that again?

MR. CRANE: If the contract is binding on the seller and requires the seller to perform certain obligations, then it is likewise binding on the buyer and requires him to have bought the goods without any kind of warranty, express or implied, because that is just exactly what it says, Your Honor.

THE COURT: I believe it's the instructions rather than the goods that are complained about.

MR. CRANE: Well, Your Honor, if they hadn't bought anything, there wouldn't be any talking about the instructions. Now in the Court's instructions that we just looked at here, the instructions are in the term of the fitness of the goods.

THE COURT: Yes.

MR. CRANE: And if what the Court is saying is that it's not the fitness of the goods that is in issue, but the fitness of the instructions, then we have a problem there.

MR. REPHAN: Your Honor, I just happen to have a brief in another case, but, Your Honor, the Fifth Circuit case, Texan Feedyards, Inc. v. Ralston Purina Co., 447 Fed.2d 660, page 668. This was a case where there was an argument made that you can separate the instructions from the sale of the goods.

And the Court said: "It is commercially unrealistic to treat separately the sale of the rationed supplement and the rendering of professional advice and assistance.

"If Texan was given inaccurate instructions by Ralston's nutrition consultant and if Texan relied on these instructions to its economic detriment, we can perceive of no reason of preventing Texan's recovery under breach-of-warranty theory."

And there are other cases, Your Honor.

THE COURT: What was the last of that that you just read? I am sorry. I didn't quite hear what you said. The last sentence.

MR. REPHAN: I said there are other cases.

THE COURT: What you were reading.

MR. REPHAN: The last part of it? I am sorry.

"If Texan was given inaccurate instructions by Ralston's nutrition consultant and if Texan relied on these instructions to its economic detriment, we can perceive of no reason of preventing Texan's recovery under breach-of-warranty theory."

And other cases, Your Honor,—

THE COURT: That is what I thought you said.

MR. REPHAN: —that say that where you have a disclaimer, that the disclaimer, Your Honor, can't run to giving negligence instructions. You can't disclaim warranties on the goods and then tell somebody to use it this way and they use it and they are injured and you say, "Well, we didn't make any warranty."

THE COURT: It has just been pointed out that in your requested instructions—this is 27 of defendants, which says if you find from a preponderance of the evidence that this defendant impliedly warranted that its pipe and

fittings would be merchantable, that such pipe and fittings were not merchantable and that plaintiff's personnel did not fail to follow the written and verbal instructions given by this defendant regarding installation of its pipe and fittings, if you do not so find, you are instructed to find for this defendant.

MR. CRANE: What part is that, Your Honor?

THE COURT: This is your Instruction 17. It starts of: "With regard to the claim of the plaintiff against the defendant, you are instructed . . ."

This was your wording about the pipe and the fittings.

MR. CRANE: Your Honor, we think that is a proper form of instruction. We don't think this is a proper instruction for this case, but we are concerned that if the instruction on this subject is given, that it be given in the proper form.

MR. REPHAN: If Your Honor will look at the way we framed our complaint, we have allegations in there—I am sure you are familiar with it—that there is a warranty that if the material is installed in accordance with the instructions and if that results in a breach, we are entitled to recover.

THE COURT: By virtue of failure to provide pipe and fittings meeting the requirements of the proposal, purchase order and subcontract which incorporated the specifications to the prime contract, defendants have breached their contract with plaintiff.

Now you are talking about pipes and fittings, too, in your complaint. And due to such breach plaintiff has sustained substantial damages and has been cause to spend—

Now why don't we get it straightened out? You are abandoning that wording, I assume.

MR. REPHAN: No, ma'am. We think it is still good wording.

THE COURT: Are you claiming defective pipes and fittings or not?

MR. REPHAN: If Your Honor please, we are not claiming the pipe was defective. We are not claiming that the fittings were defective. Part of the material was the adhesive furnished. The adhesive for some reason didn't adhere to the socket of the fittings.

Now certainly we are abandoning the pipe and the fittings, but not the adhesive. We don't know the adhesive didn't work. It didn't bond. So we have not abandoned the theory on the adhesive itself, Your Honor. The adhesive simply did not work.

Now I don't think we know to this day the cause of it.

THE COURT: They evidently think they know because they sandblasted the fixtures in the future, among other things. And so they seem to feel that roughening of the surface was a major portion of it.

MR. REPHAN: It seems to be that way, Your Honor. There is a fine line on the breach-of-contract question, but we think there is still a question on the adhesive at least, because the adhesive for some reason didn't work. Why, we don't know.

THE COURT: If both of you want the Court to say "pipes and fittings," then the Court will give "pipes and fittings."

MR. REPHAN: I have no problem with your draft instruction, Your Honor. I think Mr. Crane was the only one who had a problem.

MR. CRANE: Well, I certainly don't think it proper for the Court to say "pipes and fittings" if what the Court really means is the instructions that went with them.

THE COURT: It really isn't what the Court means, is it? It is what counsel means.

If you find from a preponderance of the evidence that this defendant impliedly warranted that its pipe and fitings would be merchantable, that such pipe and fittings were not merchantable and that plaintiff's personnel followed the written and verbal instructions given by the defendant regarding the installation of its pipe and fittings, plaintiff is entitled to a verdict . . .

If you do not so find, you are instructed to find for the defendant.

Now that is a short version of yours. Is that agreeable?

MR. CRANE: As far as the form F, we are talking about a warranty of pipe and fittings. If we are talking about a warranty of instructions, then I don't think the proposed instruction says that, Your Honor.

THE COURT: You are further instructed that for goods to be merchantable, they must be at least such as pass without objection in the trade under the contract description, or fit for the ordinary purposes for which they are used, run within the variations permitted by the agreement, are of even kind, quality and quantity within each unit, and among all units involved, are adequately contained, packaged and labeled as the agreement may re-

quire, and conform to the promises or affirmations of fact made on the container or label, if any.

You are further instructed that plaintiff has the burden of proving that such an implied warranty was given, that such pipe and fittings were not merchantable, and that plaintiff's personnel did not fail to follow the written and verbal instructions given by this defendant.

MR. CRANE: Your Honor, we started out this trial, as I understand it, when the plaintiff was contending that the fittings themselves were improper because of some change in the nature of the fittings.

I am convinced at this point that that has passed out of this trial. And I do not believe that there is a viable claim at this point with respect to the nature of the pipe and fittings.

THE COURT: What is your position on that?

MR. REPHAN: If Your Honor please, I don't think you can separate the pipe and the fittings from the adhesive and the instruction procedures. They are all one package.

As far as you take the pipe alone and fittings alone, yes, we will say at this point we don't know whether it had any defect or what was a breach of warranty. But it has to be used, it has to be installed.

They furnish adhesive, they furnish instructions. We maintain we followed the instructions and we say there was a warranty on the use of the instructions, there was a warranty on the use of the adhesive.

You have to put the four together—the pipe, the fittings, you have to take the adhesive and the instructions to produce and acceptable product and we say there was a warranty at least with the adhesive.

We believe, although we are really not sure, there was a problem with the adhesive. We think there is some evidence. And the jury has to decide that.

More importantly, we feel the instructions were erroneous and our people followed them to their detriment.

THE COURT: Isn't that really what all your effort has been directed toward insofar as your proof goes? That they have a limited shelf life of the adhesive and that the